

Interim Guidance on Oil Spill Act

Chapter 251, Acts of 2004, "*An Act Relative to Oil Spill Prevention and Response in Buzzards Bay and Other Harbors and Bays of the Commonwealth*" (the "Oil Spill Act" or "Act"), was signed into law by Governor Romney on August 4, 2004. The Act, which establishes a new General Laws Chapter 21M and amends several other existing general laws, went into effect immediately as an emergency law. An electronic version of the Act is found at <http://mass.gov/legis/laws/seslaw04/sl040251.htm>

The purpose of this Interim Guidance is to summarize the requirements of this new Act, including the state's enhanced enforcement authority, and to highlight those provisions that must be complied with immediately and the other provisions that will require compliance in the near future. No one should rely on this Interim Guidance as legal advice. DEP has also issued a Fact Sheet that includes relevant contact information and related resources. The Fact Sheet can be found at <http://mass.gov/dep/cleanup/laws/spillact.htm> Please review the Act and seek professional advice, as needed, to ensure that you have the information and advice necessary to fully understand and comply with this new law.

Provisions Requiring Immediate Compliance

As a practical matter, the vessel owners and other parties regulated under this new law must comply immediately with the following requirements of the Act:

1. Financial Assurance. The Act amended MA General Laws Chapter 21 to revise an existing section, 50B, and to add a new section, 50C, which impose more stringent financial assurance requirements on vessels in or entering MA waters for the purpose of transporting, discharging or receiving a cargo of oil, hazardous material, or hazardous waste. Such vessel owners, agents or its charterer, or the owner or operator of the terminal at which the vessel discharges or receives its cargo, are required to:
 - Provide a certificate of financial assurance to the MA Department of Environmental Protection ("DEP") in the amount of *at least 1 billion dollars*. Vessels with a capacity of less than 6,000 barrels are required to provide a certificate in the amount of *5 million dollars*.
 - A copy of the financial assurance certificate must also be posted on the vessel.
 - A certificate of financial assurance shall be demonstrated by evidence of insurance, surety bond, letter of credit, qualifications as a self-insurer or any combination thereof, or by other evidence of financial assurance approved by the Commissioner of DEP.
 - As an incentive to promote safer vessels and practices, the Act authorizes DEP to allow financial assurance in lower amounts for double hullvessels and/or for vessels with good safety records and appropriate safety equipment. More specifically, DEP's criteria for allowing lower amounts of financial assurance may include (1) the type of cargo transported by the vessel, (2) the size and construction of the vessel, including whether it is double hulled, (3) the safety record of the vessel or vessel owner, (4) the loss or accident history of the vessel or vessel owner, and (5) the safety equipment used by the vessel. **Note:** DEP is authorized to promulgate regulations implementing the above financial assurance requirements, but has not done so yet.
 - The Act also added a new section 50D that authorizes MA environmental police officers to board and inspect vessels in connection with any maritime spill incident, including for the purpose of verifying that vessels have posted a copy of the required certificate of financial assurance.
2. Alcohol and Drug Testing Applicable to Tank Vessels. Section 3 of the new Chapter 21M established by the Act provides that owners and operators of a tank vessel (i.e., any ship that carries oil or

any other petroleum product in bulk as cargo, whether self-propelled or not) shall have policies, procedures and practices for alcohol and drug testing that comply with federal requirements at 33 CFR Part 95 and 46 CFR Parts 4 and 16. Tank vessel owners and operators are responsible for ensuring that chemical tests for evidence of alcohol and drug use are taken from all persons directly involved in any serious marine incident (as defined in 46 CFR 4.03-4) within two (2) hours after such incident occurs, that all evidence pertaining to those tests and all test results are preserved, and that adequate equipment is on board to perform those tests.

3. Watch and Crew Requirements. Section 4 of Chapter 21M sets forth the following watch and crew requirements applicable to tank barges and vessels towing such barges operating in Buzzards Bay:

- *Tank Barge Towing Vessels:* For all tank barge towing vessels transiting Buzzards Bay and towing a barge carrying 6,000 or more barrels of oil, the navigation watch on the tow vessel shall consist of at least 1 licensed deck officer or tow vessel operator, who shall serve *exclusively* as a lookout with no other concurrent duties. The names of each navigation watch member shall be logged in the deck log as the member assumes duties. For each such tank barge towing vessel transiting Buzzards Bay and towing a barge carrying 6,000 or more barrels of oil, there shall be 3 licensed officers or tow vessel operators on the tow vessel (one of whom may be the designated lookout). Tow vessel operators shall maintain a list of crew members while towing a tank barge in Buzzards Bay.
- *Tank Barges:* The crew requirements for tank barges shall consist of 2 personnel (including at least one certified tanker-man), 1 of whom shall be on the tank barge at all times when the tank barge is underway, anchored or moored in Buzzards Bay *unless* the tank barge is not equipped to accommodate personnel on board or is carrying less than 6,000 barrels of oil.
- *Double Hull Exception for Tank Barges:* A tank barge that is underway, anchored or moored in Buzzards Bay is *not* required to fulfill the minimum manning safety standards as stated in Section 4 (i.e., the above-listed crew and designated lookout requirements) *if such tank barge has a double hull.*

4. Tank Vessels Must Follow Recommended Vessel Route. Section 5 of Chapter 21M requires a tank vessel operating in MA waters to travel within a recommended vessel route designated by the Coast Guard *unless* no such recommended vessel route has been designated or special circumstances make travel outside such a route necessary in order to avoid an imminent navigational hazard. Based on extensive input from the public, industry, environmental groups and others, the Coast Guard identified a recommended route for Buzzards Bay prior to the enactment of the Act. At the Coast Guard's request, NOAA published the recommended route on the nautical charts of the area, and it is DEP's understanding that the route is currently being used by tank vessels. However, the Coast Guard has not yet initiated the rulemaking process needed to formally designate this existing route as a "recommended vessel route" within the meaning of the Act. Please contact the Coast Guard to keep apprised of the status of whether and when the existing recommended route has been formally designated by the Coast Guard and/or to discuss with the Coast Guard any special circumstances that the vessel owner or operator believes may prevent the vessel from using a designated recommended vessel route.

5. Compliance with Federal Double Hull Requirements. Section 7 of Chapter 21M provides that a vessel that is not in compliance with the time schedules and requirements relating to double hulls set forth in the *federal Oil Pollution Prevention, Response, Liability and Compensation Act of 1990* shall be prohibited from docking, loading or unloading at any marine terminal in MA.

6. Areas of Special Interest. A new section 50E in Chapter 21 directs the Secretary of the Executive Office of Environmental Affairs ("EOEA") to identify specific "areas of special interest", as defined in the new section 50B, within MA waters. As specified in the definition, the Secretary must find that such areas contain obstacles to navigation or abut or include sensitive environmental resources, public recreation areas, sensitive public safety areas, etc. However, the definition states that "areas of special interest" already include *Buzzards Bay, Vineyard Sound and Mount Hope Bay*. Thus, the Act accords these key MA

waters the status of “areas of special interest” today, which triggers the piloting requirements described below in these waters immediately. On January 1, 2005, the tugboat requirement described below will be triggered in these waters. The Secretary will evaluate the appropriateness of designating other MA waters as “areas of special interest” in the future.

7. Piloting Requirements Applicable to Vessels Traveling in Buzzards Bay, Vineyard Sound and Mount Hope Bay. The Act amends several sections of MA General Laws Chapter 103, the existing state piloting law, to make U.S. vessels carrying oil, hazardous material or hazardous waste in bulk as cargo that are in or entering upon “areas of special interest” subject to the piloting requirements, including piloting rates, in Chapter 103. As explained above, because Buzzards Bay, Vineyard Sound and Mount Hope Bay have already been designated as “areas of special interest” pursuant to the definition in Chapter 21, section 50B, the piloting requirements apply to U.S. vessels carrying oil, hazardous material or hazardous waste in bulk in these MA waters today.

8. Enhanced Penalties for Violations of the Act. The Act increases the civil penalties for violations of Chapter 21, including discharges of pollutants such as oil, from \$25,000 to \$50,000 per day, and provides that any persons who violate the new alcohol/drug testing requirements or the recommended travel route requirements in Chapter 21M are subject to civil penalties of \$10,000 and \$25,000 per day respectively.

Provisions That Are Not Immediately Applicable

The following provisions of the Act are not immediately applicable, either by operation of the law itself or because the necessary regulatory or administrative actions have not yet been taken:

1. Tug Escort. Effective *January 1, 2005*, no tank vessel (including tank barges) carrying 6,000 or more barrels of oil shall enter or transit any area of special interest within MA waters *unless* the tank vessel is accompanied by a tugboat escort. This requirement does not apply to a self-propelled tank vessel. DEP is authorized to promulgate regulations to implement this section.
2. Establishment of a Vessel Traffic Service System. Section 2 of Chapter 21M provides that by *January 1, 2006*, the Commissioner of DEP shall negotiate an agreement with the Coast Guard, the Army Corp of Engineers and the MA Pilot Commissioner and other appropriate port agencies or other appropriate organizations for a “vessel traffic service system” (“VTS”) to protect Buzzards Bay (and other MA bays and harbors when recommended by the Coast Guard or recommended by the Commissioner of DEP and approved by the Coast Guard). If the Commissioner is unable to reach agreement by the above date, DEP is directed to develop a VTS plan in consultation with the above parties. DEP’s implementation of the VTS system is subject to available funding and the enactment of a related fee system.
 - The purpose of the VTS is to aid navigation by providing satellite tracking, radar, or other information regarding ship locations and traffic to prevent collisions and groundings.
 - Once implemented, covered vessels will need to report relevant information to the VTS monitor, including information such as its name, call sign, location, course, speed, destination, estimated time of arrival and any impairments to operation or navigation of the vessel. While in a VTS area covered vessels will need to maintain continuous radio contact with the VTS monitor, respond promptly when hailed by the VTS monitor and comply with all VTS measures established by the commissioner. DEP may establish a fee if necessary to implement the VTS system.
3. Oil Spill Response and Prevention Trust Fund and Fee. Section 8 of Chapter 21M authorizes the above fund and fee, which have not yet been established. More specifically:
 - The Trust Fund: The purposes of this dedicated fund include covering the costs of responding to and remediating oil spills, providing interest-free emergency loans and paying damage claims that

can not otherwise be compensated, providing training and support to state and municipal responders, and paying for vessel navigational safety improvements. The fund will be administered by DEP and funded from a variety of sources including any costs recovered from parties responsible for remediating the oil spill and from the fee described below.

- **The Fee:** The Commissioner of DEP is required to set a “uniform oil spill response and prevention fee” of not less than 2 cents for each barrel of petroleum product or crude oil, unless the Commissioner finds that a lesser fee will cause the fund to reach 10 million dollars within 6 months. The Commissioner has determined that a lesser fee will not cause the above limit to be reached within 6 months and, consequently, he will formally set the fee at 2 cents per barrel in the near future. The fee applies to the person owning the petroleum products at the time such products are received at a marine terminal in MA by means of a vessel from a point of origin outside of MA. The owner of the petroleum product is liable for the fee until it has been paid to the state. However, payment of the fee to the marine terminal operator is sufficient to relieve the owner from further liability for the fee. The fee must be remitted to the MA Department of Revenue (DOR) on a monthly basis. When the amount in the fund reaches 10 million dollars and the money is not required to carry out the purposes of the fund, DEP shall direct DOR to cease collecting the fee.

Other Provisions Relating to Liability and Enforcement

The Act also enhanced the state’s authority under other relevant statutes, primarily in the area of enforcement, that may also be applied in the context of an oil spill. Briefly, the Act covers the following areas:

- Amends Chapter 91, s.59, to increase the civil penalty for discharging petroleum products into MA lakes, rivers or tidal waters or flat from \$1000 to \$25,000. Amends Chapter 131, s.23, to increase the civil penalty for discharges of oil or other poisonous substances into coastal waters to a range of \$5000 to \$25,000.
- Closes a loophole in Chapter 21E to expressly authorize DEP to take action to prevent or control releases of “oil”, amends Chapter 21E to increase the civil penalty for violations from \$25,000 to \$50,000, and amends Chapter 21A, s.16, DEP’s penalty statute, to expressly authorize a \$25,000 civil administrative penalty for Chapter 21E violations.
- Amends Chapter 21L to establish graduated civil penalties for knowing or reckless environmental violations that cause serious bodily injury to another person (from \$100,000 to \$2 million) or that cause substantial risk of damage to natural resources or to property (from \$25,000 to \$100,000), as well as establish graduated criminal penalties or impose terms of imprisonment for negligent environmental violations that cause serious bodily injury to another person or that cause substantial risk of damage to natural resources or to property (including fines of up to \$50,000 per day and up to \$100,000 per day for second and subsequent convictions).
- Further amends Chapter 21A, s.16, to allow DEP to impose a \$25,000 civil administrative penalty for a failure to comply that is a part of a pattern of noncompliance and not an isolated instance, or for knowingly making false or misleading written statements to DEP (and to assess such penalty without a prior notice of noncompliance for the latter violation); and to assess a penalty that captures the full economic benefit realized by a violator.